United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-7228

ORIGINAL

To be argued by
HENRY L. BAYLES

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In The

United States Court of Appeals

For The Second Circuit

CALLMAN GOTTESMAN and PAUL J. PEYSER,
Plaintiffs-Appellants

vs.

GENERAL MOTORS CORPORATION and E. I. du PONT de NEMOURS & COMPANY,
Defendants-Appellees.

P/S

BRIEF FOR PLAINTIFFS-APPELLANTS

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Defendants-Appellees.

APPELLANTS' BRIEF

This is an appeal from an order dated April 12, 1977, made by Hon. Charles M. Metzner of the United States District Court for the Southern District of New York, which denied an application by plaintiffs in the above consolidated derivative suit for payment by either or both of defendants of plaintiffs' reasonable counsel fees and disbursements and expenses for services rendered since the suit was filed in June 1957.

Judge Metzner had been assigned in 1959 as sole judge to handle all aspects of this consolidated derivative suit (*Gottesman*). The present application was made pursuant to leave granted by Judge Metzner at the foot of his judgment dated January 23, 1976 (A52a),[1] which dismissed all the remaining causes in the action and provided:

> "Plaintiffs may apply at the foot of this judgment within 90 days of the date hereof, for an award of counsel fees, disbursements and expenses as referred to in the notice of hearing of the application for this date."

The "notice of hearing" was given to General Motors stockholders as directed by the Court and notified stockholders

1. Number in parentheses after (A) refer to the page in the Appendix.

that for the services rendered by General Counsel and the numerous counsel who worked with them over the twenty years since *Gottesman* was instituted, plaintiffs requested payment of a reasonable sum for counsel fees together with $345,059.94 for their disbursements (A41a, 42a).

The clerk's record indicates that pursuant to the notice of hearing, no stockholder of General Motors filed any objection to the payment of such fees or expenses or filed any approval of the determination of General Motors management to oppose payment (A109a).

Clendon H. Lee, Esq. has filed a separate appeal (Docket No. 77-7428) from an order of Judge Metzner dated July 12, 1977 denying his individual application for payment of counsel fees to himself. His appeal and that of plaintiffs-appellants were consolidated. We will discuss Mr. Lee's appeal *infra,* under Point IV.

PRELIMINARY STATEMENT

This derivative action on behalf of General Motors was instituted shortly after the Supreme Court of the United States *(United States v. du Pont,* 353 U.S. 586) on June 3, 1957, in reversing, held that du Pont by virtue of its controlling 23% stock interest in General Motors and its use of such stock interest in its sales to General Motors of automotive finishes and fabrics over a period of some decades had violated Section 7 of the Clayton Act, and remanded the action to the District Court to frame appropriate relief.

As both the majority opinion (590) and the minority opinion (610) recognized, this was a landmark decision, being the first case in which the Supreme Court sought to apply Section 7 to a vertical integration.

The moving and reply affidavits (A49a, 107a) in support of plaintiffs' application summarize the extensive services rendered. In their moving papers General Counsel stated that if required they were prepared to appear at any hearing scheduled by the Court to establish the extent and value of their services and expenses (A74a, 115a).

Defendants in their opposing papers below did not dispute the material statements in the moving papers or that the action had been instituted and continued in good faith. General Motors

claimed (A88a) that since the suit was finally dismissed without any recovery, no benefit at all could be said to have accrued to General Motors or its stockholders and that no grounds, therefore, exist for requiring it to pay counsel fees. Du Pont claimed (A76a) that since it was the party against whom recovery was sought, no basis exists for requiring it to pay counsel fees upon the dismissal of the action.

THE ISSUE

The broad issue presented upon this appeal is whether the Court should exercise its equitable jurisdiction and direct payment from General Motors and/or du Pont to plaintiffs for the reasonable value of the services rendered by their counsel and for their substantial expenses in this derivative suit.

OPINION OF THE DISTRICT COURT

In its order and opinion (430 F. Supp. 1047) denying the application, the Court recognized the unique importance of *Gottesman* involving two of the great industrial giants of this country, if not the world, stating (A123a):

> "If the plaintiffs had been successful in proving that wrongdoing existed, the recovery [against du Pont] could well have been astronomical, overshadowing any recovery ever received in any litigation in the history of this country. This could well have justified the expenditure of $345,059.94 [by plaintiffs] for disbursements."

The Court also recognized (A122a) that the suit had been instituted in good faith with court approval[2] and admitted (A120a) that it had extensive knowledge ". . . of the nature and extent of the legal services rendered". It did not require a hearing because in view of its decision, it stated that plaintiffs'

2. Although the Court admits that the institution of *Gottesman* was authorized by this Court (268 F.2d 194), it questions (A122a) that the continuance of the action had judicial approval. However, this Court in the same decision stated (198): "A decision such as that of the Supreme Court in the du Pont case is almost sure to result in stockholder attack which must be met sooner or later, if not at the hands of these self-appointed fiduciaries, then of some others. It would seem to the interest of the Court and litigants that these issues be promptly faced and adjudicated." This Court also stated the question presented is "who ought most properly to press it [the suit] forward" (197).

failure to itemize its services and expenses did not affect its determination (A120a).

In denying the application *in toto* the Court found that none of the various categories of services rendered set forth in the moving papers (A59a-71a, 111a-113a) benefited General Motors or its stockholders (1048) and that the suit had no therapeutic value (A121a, 123a).

The opinion contains certain factual errors. In alleging plaintiffs' reason for the institution of the derivative suit, the Court incorrectly stated (A122a) that ". . . it had to be instituted *after the government obtained divestiture* by du Pont of General Motors stock" (italics added).

However, this derivative suit was filed not after divestiture but in June 1957 at a time when du Pont held a controlling 23% stock interest in General Motors and when the Supreme Court had indicated that its potency had increased (353 U.S. at 607, note 36). The reversal by the Supreme Court directing divestiture (366 U.S. 316) was decided on May 22, 1961, some four years later, and the District Court's subsequent final judgment on divestiture was made on March 1, 1962 (see *infra*, p. 13).

Judge Metzner also approved the hard adversary position taken by General Motors throughout the derivative suit giving as a reason (1049) that if "wrongdoing" existed recovery would have been "astronomical".

However, almost from the beginning, before any pretrial preparation or discovery, it was agreed that the initial trial in *Gottesman* would be limited to the sole question whether General Motors had been damaged by the acts of du Pont in its sales of automotive fabrics and finishes, the only products passed upon by the Supreme Court.

In connection with this aspect of the case plaintiffs stated "There is nothing in this case which seeks to impose any liability on General Motors. There are no issues here raised which charge wrongdoing on the part of General Motors" (Plaintiffs' Memorandum in the District Court in Support of Motion to Dismiss Answer of General Motors, p. 2). General Motors recognized this, for in its post trial brief dated March 13, 1967, to support its own position, it quoted from plaintiffs' memorandum and stated (p. 14):

> "There are no issues here raised which charge wrongdoing on the part of General Motors."

Furthermore, the Supreme Court in reversing and holding that du Pont had violated the Clayton Act, did not hold that General Motors had any culpability. This was recognized by the District Court in 177 F. Supp. 1 when it said (10, 11):

> "General Motors contends that since the Supreme Court has not found that it has violated Section 7 of the Clayton Act or any other provision of the antitrust laws, this Court is without power to grant any relief against it . . ." (see also 366 U.S. at p. 348).

Hence the fact that "wrongdoing" with respect to automotive fabrics and finishes was charged by plaintiffs in the derivative suit to du Pont and the fact that recovery against du Pont for such wrongdoing might run into a staggering sum furnishes no justification whatsoever for General Motors taking a hard adversary and indeed obdurate position throughout the litigation. As will be shown, General Motors continuously joined with du Pont throughout the litigation in attempting to defeat any recovery in its favor against du Pont.

Judge Metzner in his opinion also rejected plaintiffs' contention that securing the compulsory accounting by du Pont and airing the question as to whether General Motors had been damaged by the unlawful actions of du Pont had a therapeutic effect which benefited General Motors stockholders. In rejecting that contention, the Court stated. "Frankly, such an 'airing' was made by the government in the divestiture suit years before". (A123a).

However, it is clear that no such "airing" had taken place in the Government suit. That suit did not involve the significant question presented by *Gottesman* whether du Pont's actions found to have violated the antitrust laws, and which plaintiffs claim also violated du Pont's fiduciary obligation — had *damaged* General Motors. The absence of any such inquiry was recognized by this Court in 436 F. 2d 1205 when it stated (p. 1209):

> "The question of injury to General Motors was not raised by the Government in its pleadings,

was not involved in the charge of violation of section 7 of the Clayton Act and was, accordingly, neither considered nor resolved by the Court in the Government's case."

SUMMARY OF PLAINTIFFS' ARGUMENT

Under Point I we will show that General Motors should be required to pay plaintiffs' reasonable counsel fees and substantial disbursements even though no monetary recovery had been obtained. The action was instituted and continued in good faith with court approval and based upon clear and reasonable grounds. Payment should be granted because (a) the action served the best interests of General Motors stockholders and conferred substantial benefits upon them; (b) the action served to vindicate the statutory purpose of the antitrust law, established means for its enforcement and constituted good corporate therapeutics; and (c) the unjustifiable obdurate action of General Motors itself justified such payment.

Under Point II we will show that du Pont also should be required to make such payment. As stockholder in control of General Motors, it had the clear burden of coming forward with evidence and the burden of proof to establish that its sales of automotive fabrics and finishes to General Motors over a period of many years were scrupulously fair, proper and constituted "arms-length" dealing. Du Pont had been adjudged to have violated the antitrust law specifically in connection with such sales. *Gottesman* had to be instituted, therefore, because of the foregoing in order to obtain an accounting and determination by a court as to whether General Motors had been damaged. Since this accounting was caused by the illegal actions of du Pont and since du Pont had the burden of establishing its non-liability, it should be required to bear the expenses of the action particularly since du Pont (and General Motors) strongly resisted such accounting and *Gottesman* was for all practical purposes a suit to compel a compulsory accounting.

Under Point III we will show that General Counsel should be compensated by du Pont and General Motors for their services in connection with the preparation and submission by General Counsel of their report to the District Court after the final disposition of claims pertaining to automotive fabrics and finishes which report was prepared pursuant to agreement among all parties and approved by the Court.

STATEMENT OF FACTS

A. The Government Case Against du Pont. (A52a *et seq.*)

In 1949 a civil suit was instituted by the Government in the Federal District Court for the Northern District of Illinois entitled *United States v. du Pont et al.* In that suit the Government sought a judgment declaring, among other things, that du Pont[3] had violated the Sherman and Clayton Antitrust Acts in connection with its sales of automotive fabrics and finishes and other products to General Motors[3] and that such violation occurred by virtue of du Pont's having a 23% controlling stock interest in General Motors for many years and using that stock interest for its own purposes and in violation of law.

After trial in the District Court before LeBuy, J., the Government's complaint was dismissed, the Court holding that the Government had not proved any violation of any antitrust law with respect to any of the products (126 F. Supp. 235).

Thereafter, an appeal was taken by the Government upon the ground that the facts established that du Pont had violated both the Sherman and the Clayton Acts. On June 3, 1957, the Supreme Court reversed (*United States v. du Pont,* 353 U.S. 586). It held that du Pont had violated Clayton §7 in connection with its sales of automotive fabrics and finishes to General Motors. Since this holding, as the Court noted later, "sufficed to dispose of the case," it did not decide "whether du Pont had also violated the Sherman Act" (366 U.S. at 319, note 1, and 353 U.S. at 588, note 5). Further, the Court did not pass upon any items sold by du Pont to General Motors other than automotive fabrics and finishes and remanded the matter to the District Court for the entry of appropriate relief.

When upon remand the District Court failed to direct complete divestiture of du Pont's 23% stock in General Motors (177 F. Supp. 1), the Government took a second appeal. The Supreme Court again reversed (366 U.S. 316) holding that only full divestiture by du Pont would afford adequate relief. After further hearings, a final judgment was entered by the District Court on March 1, 1962, providing for complete divestiture over a period of years.

---

3. Du Pont and General Motors were organized under Delaware law and are authorized to do business in New York and have been doing such business (Complaint ¶3, admitted in answers of defendants).

B. Findings of the Supreme Court. (A54a *et seq.*)

In significant holdings in its two opinions, the Supreme Court said the following with respect to du Pont's use of its controlling stock interest in General Motors: "We held that du Pont's acquisition of the 23 percent of General Motors stock had *led to the insulation from free competition* of most of the General Motors market in automobile finishes and fabrics . . ." (366 U.S. at 318, 319); "The inference is overwhelming that du Pont's commanding position was *promoted by its stock interest* and was *not gained solely on competitive merit*" (353 U.S. at 605); "But the wisdom of this business judgment cannot obscure the fact, plainly revealed by the record, that du Pont *purposely employed its stock* to pry open the General Motors market *to entrench itself* as the primary supplier of General Motors' requirements for automotive finishes and fabrics" (353 U.S. at 606); that the "acquisition of the General Motors' stock, and *the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition . . .*" (353 U.S. at 589); that the result of the Government suit should "effectively *pry open to competition* a market that has been *closed by defendants' illegal restraints*" (366 U.S. at 323, quoting from *International Salt Co.*, 332 U.S. 392, 401); that "The key to the whole question of antitrust remedy is of course the discovery of measures *effective to restore competition*" (366 U.S. at 326); that it was necessary that there be *"dissolution of the intercorporate community of interest* which we found to violate the law" since if continued, this would "induce General Motors to favor du Pont, the *very result which we found illegal* on the first appeal" (366 U.S. at 331); and that over the years General Motors management "has become accustomed to du Pont's *special relationship*" (366 U.S. at 332). (Emphasis added.)

As a result of such findings, the compelling question — not resolved by the Supreme Court — was whether as a result of the illegal activities of du Pont, General Motors had been damaged and the extent thereof. This question had to be squarely faced and independently and fairly determined. In view of the existence of the unlawful actions over the many years, the independent investigation and judicial determination had to be undertaken promptly to avoid the further running of the statute of limitations against any claim General Motors might have against du Pont. Also such an investigation and litigation to be at all meaningful and of any value, obviously, would have to be

undertaken by parties acting independently and free from the influence of General Motors' administration.

C. The *Gottesman* Derivative Suit. (A58a *et seq.*)

Shortly after the Supreme Court rendered its first decision against du Pont in 1957, *Gottesman* and other stockholders' derivative suits predicated upon the Supreme Court decision, were instituted on behalf of General Motors against du Pont, joining General Motors as a codefendant.

By order of Hon. Edward Weinfeld dated July 3, 1958, these derivative suits were consolidated, other similar suits stayed, and the firm of Netter and Netter who had instituted suit on behalf of Peyser, were designated as General Counsel in the consolidated action. Previously an application by the defendants to change the venue of the action to Delaware was denied by order of Judge Kaufman on January 24, 1958.

The amended consolidated complaint contains various causes of action in which claims were asserted against du Pont on behalf of General Motors for violation of the Sherman and Clayton antitrust laws and also under the common law for violation by du Pont of its fiduciary obligations to General Motors in the use for its own purposes of the "practical control" it held over General Motors. The principal causes of action (first and ninth) involved sales by du Pont to General Motors of automotive fabrics and finishes over a period of many years. With respect to these causes of action the complaint in effect sought an accounting to determine what damages were sustained by General Motors by reason of du Ponts' antitrust violation (first cause of action) and breach of fiduciary relation as a controlling stockholder (ninth cause of action).

D. The Establishment of Plaintiffs' Right to Sue du Pont Derivatively for the Benefit of General Motors. (A61a *et seq.*)

The preliminary equitable claim giving plaintiffs-stockholders the right to sue in the name and for the benefit of General Motors is separate and apart from the derivative cause of action for damages against du Pont. This claim would have to be sustained at the threshold before the merits of the claim could even be considered.

However, at the very outset, both defendants sought to block completely any judicial determination at all as to whether

General Motors had been damaged. Before serving their answers in *Gottesman,* du Pont as well as General Motors moved to dismiss the complaint claiming that plaintiffs had no standing to sue.

After submission of lengthy papers, briefs and argument, defendants' application was denied by order of Judge Sugarman dated March 24, 1959, in an opinion (171 F. Supp. 661). Thereafter defendants sought leave to appeal to this Court. The application was argued and denied (268 F. 2d 194); and reargument was also denied on August 22, 1959. In denying defendants' application, the Court indicated that "the chance of reversal here seems so slight as to be quite negligible." (196).

In its opinion this Court also found that the derivative suit was properly instituted and should be continued. It stated (197):

> ". . . the wrongful acts alleged — violations of the antitrust laws by du Pont — can in no way be ratified or rectified by a vote of the shareholders of General Motors. . . .
>
> "In short, the question before these shareholders, were a poll of them here to be ordered, *would be not whether this action should be stopped, but merely who ought most properly to press it forward.*" (italics added).

The Court went on to note (198):

> "We recognize that defense of a derivative suit of this kind may be hard and expensive. But no substitute method of minority corporate supervision has yet been developed. . . . *A decision such as that of the Supreme Court in the du Pont case is almost sure to result in stockholder attack which must be met sooner or later, if not at the hands of these self-appointed fiduciaries, then of some others . . .*" (italics added.)

E. Modification of the Final Judgment in the Government Action Against du Pont.

In the prosecution of *Gottesman,* defendants attempted to take advantage of certain provisions in the final judgment as it

was originally entered by the District Court in the Government case after the first reversal by the Supreme Court. Since these provisions would have seriously prejudiced *Gottesman,* it was necessary for General Counsel to seek to have them modified.

At the conclusion of hearings conducted after the first reversal, Judge Le Buy stated the following (177 F. Supp. at 6):

> "The decision of the Supreme Court reversed the prior determination of this Court, D.C., 126 F. Supp. 235, that the acquisition of stock of General Motors by du Pont did not violate Section 7 of the Clayton Act *but did not review or reverse the findings of this Court that there had been no violation by any of the defendants of Sections 1 or 2 of the Sherman Act . . .*" (italics added).

Accordingly, he indicated in his final judgment of November 17, 1959, that his original judgment of dismissal had been vacated *only in part* by the Supreme Court, leaving his dismissal of the Sherman Act charges *undisturbed.* In ¶ 2 of the judgment he accordingly provided:

> "In conformity with the mandate of the Supreme Court, the Judgment of this Court of December 9, 1954 which dismissed the amended complaint finding no violation of Section 1 or 2 of the Sherman Act or Section 7 of the Clayton Act, is hereby vacated *insofar as it adjudges du Pont not to have violated Section 7 of the Clayton Act . . .*" (italics added).

Using that judgment as a springboard, both defendants alleged (General Motors Answer ¶9, du Pont Answer ¶7) in the *Gottesman* case after the Supreme Court's first reversal, that there had been a final judgment in the Government case by the District Court declaring that there had been no violation of the Sherman Act and that the judgment and findings to this effect had not been disturbed and urged that the Supreme Court's findings of restraint and use by du Pont of its stock control to further its own interests, were of no benefit to plaintiffs (Answer of General Motors ¶83, Answer of du Pont ¶73).

When General Counsel learned of the form of the final judgment, they brought the error to the attention of the Justice

Department and citing various authorities, urged that the final judgment of the District Court after the reversal, should have vacated completely the dismissal of the Sherman Act charges.

The Government accepted the suggestion of General Counsel and, in its reply brief submitted to the Supreme Court dated February 1961 in connection with the second appeal (366 U.S. 316) the Government stated (pp. 11, 12):

> "The court below seemed to believe that its prior judgment that there had been no violation of Section 1 or 2 of the Sherman Act remains in full force because the Supreme Court reversed the judgment on the Clayton Act violation alone, without reaching the other issues. R3184, 3301. However, since an appeal was duly taken from that adjudication and the Court found it unnecessary to reach the merits on that issue, the situation is the same as though the case had become moot while the appeal was pending. It is generally accepted that under such circumstances the decision of the lower court should be vacated since the appeal was frustrated. Cf. *United States v. Munsingwear, Inc.*, 340 U.S. 36. Therefore, it is as though there had been no adjudication on the Sherman Act counts and it is appropriate in framing relief to take into consideration the provisions of that Act as well as the Clayton Act."

After the second reversal by the Supreme Court, General Counsel through local counsel in Chicago sought to intervene in the Government suit for the purpose of correcting any final judgment which might be entered by the District Court.

In connection with that application, the Government suggested in its memorandum (p. 11) that the Court hold our application in abeyance pending the entry of final judgment for if the District Court accepted the modification proposed by the Government, "the application [to intervene] will become moot." General Counsel agreed with the Government's suggestion.

A copy of a memorandum submitted by du Pont in opposition to our application to intervene was received and General Motors may have also submitted a memorandum but no copy is available.

Thereafter, upon reconsideration, Judge Le Buy agreed with the Government's position, stating, in part, in his opinion dated March 1, 1962:

> "The Supreme Court apparently considered that in view of its disposition of the case on the Clayton Act charge, the Sherman Act issues presented by the appeal were rendered immaterial or moot. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 588, n.5 (1957); 366 U.S. 316, 319, n.1 (1961). In such circumstances the lower court judgment should be vacated to the extent appealed from, in order to prevent it from 'spawning any legal consequences' (*United States v. Munsingwear*, 340 U.S. 36, 41 (1950))."

Accordingly, in his final judgment of March 1, 1962, Judge Le Buy in Article II provided:

> "In conformity with the judgment of June 3, 1957 of the Supreme Court, the judgment of this Court of December 9, 1954, which dismissed the amended complaint finding no violation of Section 1 or Section 2 of the Sherman Act or Section 7 of the Clayton Act, is hereby vacated as to du Pont and General Motors as to those matters specified in the Notice of Appeal filed herein on February 4, 1955, and it is hereby adjudicated that du Pont's acquisition of General Motors stock has violated Section 7 of the Clayton Act."

The above proceedings were, of course, known to counsel for du Pont and General Motors who participated in them. They were also brought to the attention of Judge Metzner by General Counsel.

F. To Enable Plaintiffs to Recover Maximum Damages on Behalf of General Motors. (A62a *et seq.*)

In the prosecution of *Gottesman*, General Counsel sought to obtain maximum benefits for General Motors. After consolidation, the plaintiffs in the action were Rita Gottesman, Paul S. Peyser, Maria Mattiello and Arlyne Zucker. General Counsel had represented Peyser, whose stock ownership began

on May 4, 1950, while the other plaintiffs had been represented by other counsel.

Rita Gottesman, an original plaintiff died and her husband, Callman Gottesman, was substituted. After suit was instituted, plaintiff Zucker failed to appear for examination and she was dismissed as a party plaintiff by order dated March 1, 1960. Plaintiff Mattiello, was examined by defendants and thereafter the Court found on May 10, 1961, that she did not prove that her stockholdings had their origin as alleged and that her holdings only began on February 12, 1951. Mattiello's complaint was dismissed (279 F. Supp. at 363, note 3) leaving only Gottesman and Peyser as plaintiffs.

As a result of these holdings, upon motion of the defendants, the District Court ruled on July 10, 1961, that plaintiffs, under Section 23, were limited to a recovery of whatever damages may have been sustained by General Motors only subsequent to May 4, 1950 when plaintiff Peyser acquired his stock.

To overcome this, General Counsel cooperated with efforts of other General Motors stockholders — whose holdings arose long prior to May 1950 — to intervene in the action. The several applications to intervene, which would have enlarged the period for recovery, were opposed by both du Pont as well as General Motors and denied by the Court on March 30, 1960 and March 18, 1963, because of the early injunctive order dated July 3, 1958 of Judge Weinfeld.

Thus, plaintiffs, had they been successful at the trial, could not have recovered on behalf of General Motors all damages which General Motors, itself, would have been entitled to recover if it had been the plaintiff.

To overcome this severe limitation, on February 23, 1963 a separate derivative action (63 Civ. 533) by a General Motors stockholder, Margo Schiff, was timely instituted shortly before the running of limitations. Plaintiff was represented by David Brady, Esq., of O'Connor & Farber, who had been serving since 1962 as Trial Counsel in the *Gottesman* case. The *Schiff* case contained causes of action similar to those alleged in the *Gottesman* case. It also alleged that plaintiff's stockholdings originated as far back as 1936 which greatly enlarged the amount of possible recovery for General Motors.

An application was then made to consolidate the *Schiff* and the *Gottesman* cases. The application was opposed by both du Pont and General Motors and denied by order dated March 15, 1964, the District Court predicating its decision also upon the early injunctive order. Efforts were made to have this Court review this order but without success. By order of the Court, the time of defendants in the *Schiff* case to answer was extended until after the final determination of the *Gottesman* case. As a result, the *Schiff* case remained in abeyance until it was dismissed in conjunction with the final dismissal of *Gottesman* on January 23, 1976, as will be hereafter discussed.

Although effectively stayed, the *Schiff* case served a beneficial purpose, for, if the plaintiffs in *Gottesman* had prevailed, the stockholders of General Motors would not have been limited in their efforts to obtain maximum recovery for General Motors.

During the course of *Gottesman*, du Pont — joined in by General Motors — also attempted to bar plaintiffs from asserting their claims by urging that in the Government case General Motors did not take such a position and the plaintiffs were thus now barred under the doctrine of preclusion against inconsistent positions. The application by du Pont to bar plaintiffs was denied by the District Court in an opinion and order dated October 7, 1963.

Further, du Pont pleaded various statutes of limitations to bar or limit plaintiffs' claims. However, although General Motors was to be the beneficiary of any recovery obtained by plaintiffs, it also itself pleaded statutes of limitations to limit or bar its own recovery (Answer ¶ 85).

The Court passed upon the various questions of limitations in an opinion and order dated March 15, 1963, which it amplified in a subsequent opinion and order dated October 4, 1963, pertaining to the relation back of the various claims asserted in plaintiffs' amended complaint.

G. The Establishment of a Cause of Action by General Motors for Damages Under the Clayton Act and the Use of the Judgment and Findings of the Supreme Court. (A64a *et seq.*)

The antitrust statute encourages the institution of civil damage suits following a judicial determination of a violation of the antitrust laws not only by providing for treble damages, but

also by authorizing the use of the Government judgment and decree and findings with *prima facie* effect in the subsequent civil suit. Of course, this greatly simplifies and considerably reduces the expenses in the preparation and trial of a damage suit. This was particularly true in the *Gottesman* case where the issues were complex[4] and ascertainment of all relevant facts difficult — all of which were made even more so by the adversary posture and obdurate conduct adopted by General Motors.

From the very beginning of the *Gottesman* case plaintiffs took the position that the Supreme Court adjudication of du Pont's Clayton Act violation as a result of the various findings of restraint did give rise to a cause of action for damages and that under the statute, plaintiffs in *Gottesman* were entitled to use the judgment and findings of the Supreme Court with *prima facie* effect.

However, du Pont joined in by General Motors repeatedly urged that plaintiffs were entitled to little or no benefit from the Supreme Court judgment or findings and urged the following: (1) the adjudication simply held that du Pont had violated the Clayton Act and this could furnish no basis for any cause of action for damages by General Motors (or anyone else); (2) plaintiffs were not entitled to use the judgment or findings with *prima facie* effect or in any other significant respect; and (3) to prove any Sherman Act violation, plaintiffs had to submit independent proof unsupported by any *prima facie* findings or judgment.

If the position adopted by both defendants were valid, it would acutely affect the preparation and trial of the action. The District Court recognized this and properly entertained argument and submission of pre-trial memoranda in that connection.

Thereafter, in an opinion dated September 18, 1963 (221 F. Supp. 488) and pre-trial order of November 12, 1963, the Court dismissed plaintiffs' claim for money damages under Section 7 of the Clayton Act. The Court found that the violation of Section 7 of the Clayton Act by the Supreme Court could not furnish any base for a subsequent civil suit for damages on behalf of General Motors against du Pont; and that since plaintiffs could recover

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4. Counsel for du Pont stated in the Government case that no previous antitrust case had involved interests of such magnitude or presented such complex problems of relief (366 U.S. 318 at 342).

damages only after May 4, 1950[5] (which was subsequent to the institution of the Government suit in 1949) plaintiffs could not rely upon the Supreme Court judgment and had only limited *prima facie* use of certain findings.

Nevertheless, the District Court, recognizing that its decision was crucial, certified its order for immediate appeal over the opposition of defendants. Pursuant to such certification, plaintiffs applied for leave to appeal. Both defendants opposed the application. The Court of Appeals denied leave to appeal on January 31, 1964. An application was made by plaintiffs to have the Supreme Court review the matter, which was opposed by defendants. Certiorari was denied (379 U.S. 882), as was rehearing (379 U.S. 940).

Accordingly, plaintiffs at the first trial had to rely solely upon independent proof of a Sherman Act violation and breach of common law duty. As plaintiffs were deprived of the statutory evidentiary aids, the preparation of the case for trial and the trial were rendered inordinately time-consuming and expensive.

H. Limitation of Issue to be Initially Tried. (A68a)

Early in the *Gottesman* case, before any pre-trial disclosure in view of the enormous complexity of the case and the various claims, the parties agreed and the Court approved, that the trial would be initially limited to automotive fabrics and finishes, the products passed upon by the Supreme Court, and that the initial trial would be further limited to a determination whether General Motors had been damaged as a result of du Pont's violation of the antitrust laws or breach of its fiduciary obligation to General Motors. If the Court found in the affirmative, then the quantum of damages would be later determined upon an accounting.

I. Pre-Trial Disclosure. (A68a *et seq.*)

In order to facilitate pre-trial disclosure it was agreed and approved by the Court that the record of the Government case and exhibits where relevant could be used by either party with the right of the plaintiffs to cross-examine any of such witnesses whose testimony the defendants wished to use. Under that agreement, extensive cross-examinations were conducted by plaintiffs of Messrs. Sloan, Pratt, Wirshing, Weckler and numerous other persons.

5. The opinion below inadvertently states (1049) the date as "May 1959," the correct date being May 1950 (see 414 F.2d at 957, 958 note 2).

Lengthy interrogatories and cross-interrogatories were served and answered. Extensive examination of records was conducted in Wilmington, Detroit and New York by plaintiffs' counsel. In preparation for trial, further depositions of witnesses were taken by plaintiffs in Wilmington, Detroit, New York and other places.

In order to determine the scope of the claims and the validity of the various defenses, numerous memoranda were prepared by General Counsel and the Court rendered various pre-trial orders and opinions.

In the conduct of pre-trial disclosure neither defendant was cooperative. Plaintiffs were severely hampered in trial preparation and ascertainment of facts by their inability to obtain from defendants important data and records, some of which, it was claimed, had been lost or destroyed.

Early in the case certified public accountants were called in by General Counsel to assist in pre-trial preparation and for their actual assistance and testimony at the trial. They rendered extensive services over the years. Expert witnesses were questioned.

Subsequent to the assignment in 1959 of *Gottesman* for all purposes to Judge Metzner and prior to trial, 14 pre-trial conferences were held and the transcripts of these conferences totalled 1,316 pages. Following the trial, at least ten further conferences were held before the Court.

J. The First Trial and Dismissal of the Causes of Action Pertaining to Automotive Fabrics and Finishes. (A69a *et seq.*)

On November 21, 1966, the first trial of *Gottesman* began limited as above indicated. This trial continued through January 26, 1967. It covered a period of 36 trial days. The trial transcript comprised almost 10,000 pages; over 1,000 exhibits were introduced; the testimony of 24 witnesses was taken.

After trial, counsel for plaintiffs prepared and served and filed comprehensive proposed findings of fact and conclusions of law, a post-trial memorandum and reply memorandum.

On December 13, 1967, an opinion was filed by Judge Metzner dismissing the antitrust and fiduciary claims involving automotive finishes and fabrics (279 F. Supp. 361).

Thereafter, upon plaintiffs' application and over the objection of both defendants, the Court found that more than one claim for relief was presented and directed the entry of final judgment pursuant to Rule 54(b) with respect to the dismissal of claims covering automotive fabrics and finishes. Plaintiffs were thus able to and did file their appeal. However, defendants still objected and moved in this Court to dismiss the appeal which motion was denied (401 F. 2d 510).

In the prosecution of the appeal, counsel prepared a lengthy appendix and a comprehensive brief on appeal, and the appeal was thereafter argued.

K. The First *Gottesman* Appeal. (A70a)

On August 13, 1969, this Court rendered an opinion (414 F. 2d 956) upon plaintiffs' appeal. It did not pass upon their contentions that du Pont had damaged General Motors by reason of its violation of the antitrust laws or common law fiduciary obligation.

It reversed 221 F. Supp. 488 and held that the Supreme Court's adjudication that du Pont had violated the Clayton Act in view of its findings gave rise to a cause of action for damages in favor of General Motors; that even though the *Gottesman* plaintiffs were prevented from recovering damages prior to May 4, 1950, they could still use the judgment and significant findings with *prima facie* effect; that the District Court had failed to give full effect to the Supreme Court findings; and this Court remanded the case for further proceedings.

As a result of the services rendered by plaintiffs' counsel, in the face of the opposition of du Pont as well as General Motors, it was thus established (1) that the adjudication by the Supreme Court of the Clayton Act violation by du Pont created a cause of action for damages; (2) that such a cause of action was in favor of General Motors against du Pont; and that the plaintiffs were permitted to use with *prima facie* effect the judgment and significant findings of du Pont's control and use of its control in its sales to General Motors.

The importance of this result was noted by the Court of Appeals for the Third Circuit in *NBO Industries Treadway Cos. Inc. v. Brunswick Corp.*, 523 F. 2d 262, when it stated (p. 272):

* "On appeal from this final judgment the

*Judgment vacated as to damages and remanded in _US_,50 L.Ed.2d 701(1977).

> Second Circuit reversed the earlier interlocutory holding that a §7 violation could not be the basis for a §4 recovery. *Gottesman v. General Motors Corp.*, 414 F. 2d 956 (2d Cir. 1969). (Gottesman I). ***The great significance of Gottesman I was that it did not hold that only those foreclosed from the General Motors market could recover. General Motors itself, which was not in the fabrics and finishes business, could recover as well."

L. The Second *Gottesman* Trial. (A70a)

Upon remand, further proceedings were held before Judge Metzner. Counsel for plaintiffs prepared, served and submitted a brief and reply brief. Then on March 30, 1970, Judge Metzner filed his opinion in which he again dismissed plaintiffs' claims with respect to automotive fabrics and finishes (310 F. Supp. 1257). A judgment was entered to this effect, from which plaintiffs appealed.

M. The Second *Gottesman* Appeal. (A70a)

This judgment was affirmed on January 4, 1971 (436 F. 2d 1205). In its opinion the Court of Appeals found that plaintiffs had not established that General Motors had in fact been damaged in connection with du Pont's antitrust violation. It further held (1212) that du Pont had sustained its burden of establishing the fairness of its transactions with General Motors and had therefore not breached any fiduciary obligation to General Motors.

Plaintiffs' application for rehearing was denied on February 1, 1971. Thereafter the United States Supreme Court upon application (403 U.S. 911) and rehearing (404 U.S. 876), declined to review the determination of this Court.

N. Report to the Court by General Counsel as to Disposition of Remaining Claims. (A71a)

With the final dismissal of the causes of action pertaining to automotive fabrics and finishes in the *Gottesman* case, there still remained various other causes of action in the *Gottesman* case as well as the causes of action in the back-up *Schiff* case.

Thereafter, by agreement it was decided that plaintiffs'

counsel in *Gottesman* and *Schiff* would review all of the facts, including new material and data to be supplied by defendants and would then file their reports with the Court containing their recommendations whether the further prosecution of the *Gottesman* and *Schiff* cases would be in the best interests of the stockholders of General Motors.

Both General Motors and du Pont, under their agreement, submitted additional proof to General Counsel and to counsel in the *Schiff* case. Thereafter General Counsel and their associates, and *Schiff* counsel reviewed all of the existing data and evidence, including the new matter submitted to them by defendants.

Plaintiffs' counsel in the *Gottesman* and *Schiff* cases then made their respective reports and filed them with the Court. In their reports they recommended that it would not be in the best interests of the General Motors stockholders to continue with the suits for upon the facts and law there appeared to be little likelihood of recovery upon the remaining claims and that continuation of the litigation would only entail needless expense to General Motors.

Accordingly, based upon the reports and stipulations entered into by the parties, applications were made for dismissal with prejudice of the remaining claims in the *Gottesman* case and claims in the *Schiff* case. Orders were thereupon made by the Court for notice to General Motors stockholders of the requested relief, the notice also reciting the intent of plaintiffs to apply for their reasonable counsel fees and disbursements and expenses aggregating $345,059.94.

After due notice was given as required by the Court order, the matter came on for hearing before Judge Metzner on January 23, 1976. There was no opposition to the applications to dismiss and the Court on that date signed judgments of dismissal with prejudice of the *Gottesman* and *Schiff* cases. In the *Gottesman* judgment the Court included provisions quoted *supra,* at p. 1, permitting plaintiffs to apply, at the foot of the judgment, for payment by defendants of their reasonable attorneys' fees, disbursements and expenses as referred to in the notice.

The foregoing description only summarizes the extensive and protracted services rendered by plaintiffs' attorneys. For a more detailed description, the Court's attention is respectfully invited to the entries upon the clerk's docket, to the various

papers, memoranda, and transcripts on file in the *Gottesman* and *Schiff* cases, and to the Court's minutes and notations.

From 1957 to the dismissal of the actions on January 23, 1976, the services were conscientiously rendered by General Counsel and the members of their firm and of other firms and attorneys assisting in this massive litigation. In all there were over twenty attorneys who participated in the prosecution of this case and the various appeals, including David Brady (now deceased) as Trial Counsel and his assistant, Clendon H. Lee; Richard Netter and members of his firm; Leo Brady and his associates; and Henry L. Bayles and Arthur B. Netter—all of whom rendered extensive services. In addition, substantial services were rendered by Edward A. Rothenberg, Robert Netter, Abbott Gould, Jesse R. Bacharach, all of whom are now deceased.

Special clerks and stenographers were employed by the various counsel who worked upon this case; voluminous files were maintained; lengthy consultations were had with experts; the accounting firm of Shmerler & Co. and its partner, Lewis A. Freeman, in particular, worked continuously with counsel on pre-trial preparation, prepared schedules and data and testified at the trial.

Before the application for counsel fees was made, Judge Metzner, to whom the case was assigned for all purposes in 1959 and who continuously presided over the case thereafter, indicated he was thoroughly familiar with the nature of the services rendered by plaintiffs' attorneys, the time in general required for these services over the many years and the professional standing of plaintiffs' counsel and Associate Counsel.

In our application as we noted, *supra,* if the Court desired to have a hearing in connection with the present application, plaintiffs' General and Associate Counsel stood ready to attend. However, the Court did not deem a hearing necessary to reach a decision denying the application.

ARGUMENT

I.

THE INSTITUTION AND CONTINUANCE OF *GOTTESMAN* WAS IN THE BEST INTERESTS OF AND BENEFITED GENERAL MOTORS STOCKHOLDERS, AND SERVED TO VINDICATE A STATUTORY POLICY. GENERAL MOTORS SHOULD BE REQUIRED TO PAY PLAINTIFFS' REASONABLE COUNSEL FEES AND EXPENSES, PARTICULARLY IN VIEW OF ITS OBDURATE CONDUCT THROUGHOUT THE LITIGATION.

The courts have broad jurisdiction and discretion to determine whether plaintiffs, stockholders in a derivative suit, are entitled to payment from their corporation for their reasonable counsel fees and expenses. As stated in *Hall v. Cole,* 412 U.S. 1 (1973) at pp. 4, 5:

> "Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees *when the interests of justice so require.* Indeed, the power to award such fees 'is part of the original authority of the chancellor to do equity in a particular situation', *Sprague v. Ticonic National Bank,* 307 U.S. 161, 166, 83 L Ed 1184, 59 S Ct 777 (1939), and federal courts do not hesitate to exercise this inherent equitable power whenever '*overriding considerations* indicate the need for such a recovery'. *Mills v. Electric Auto-Lite Co.,* 396 US 375, 391-392, 24 L Ed 2d 593, 90 S Ct 616 (1970); see *Fleischmann Distilling Corp. v. Maier Brewing Co.,* 386 US 714, 718, 18 L Ed 2d 475, 87 S Ct 1404 (1967)." (italics added).

Each application for payment of counsel fees must be determined upon the facts, circumstances and equities presented "in a particular situation," as the Court above noted. The remarks of Mr. Justice Frankfurter in *United States v. du Pont,* 366 U.S. at 357 are pertinent:

> "It is, however, well to remember that the wise admonition that general principles do not decide concrete cases has sharp applicability to equity decrees. Any apparently applicable policy or rule, abstractly stated, must be related to the specific circumstances of a particular case in which it is invoked and applied."

The interests of General Motors stockholders clearly required the *Gottesman* suit and an accounting by du Pont before an impartial tribunal to ascertain whether its actions, declared unlawful by the Supreme Court, caused damage to General Motors and the extent thereof during the decades of its stock ownership and control.

But, both before and even after divestiture was ordered by the Supreme Court, General Motors refused and failed itself to institute suit against du Pont. On the contrary, as we have noted, throughout the *Gottesman* case, General Motors at every stage of the proceedings opposed and impeded plaintiffs' efforts in the prosecution of the action. It has taken a position in each instance paralleling that of du Pont and adopted a hard, obdurate, adversary line even though it was to be beneficiary of any recovery which might be obtained.

General Motors adopted this hard adversary position even though in this suit with respect to the primary claim, *i.e.*, automotive fabrics and finishes which was the only one tried, no charge of wrongdoing was made by plaintiffs against it, *(supra,* pp. 4, 5). General Motors adopted this position even though it had not been adjudged culpable in the Clayton 7 violation of du Pont (*supra,* p. 5).

At no time, either before or after divestiture had been ordered, did General Motors claim that it had caused to be made an independent, impartial outside investigation as to whether it had been damaged by the unlawful actions of du Pont; at any event, at no time did it supply plaintiffs with a copy of the report of any such investigation or even one made by its administration, or advise its stockholders of such a report and the contents thereof (A57a, 11a). General Motors admits that it was "the original management decision not to sue du Pont . . . ." (A99a).

As justification for its action, General Motors claimed (A100a, 117a) that in the Government case in Chicago it had

outside counsel to assist its own counsel, but that is a far cry from having an independent, unbiased, uncontrolled investigation. Further, significantly, the Government case as noted, *supra*, admittedly, did not in any way involve what *damages* had been sustained by General Motors by du Pont's actions, the issue involved in *Gottesman* (see 436 F.2d at 1209).

But whether or not a charge of wrongdoing against General Motors had been made against it in *Gottesman*, the stockholders were clearly entitled to have a full, thorough and independent airing of the claims against du Pont and a determination made as to whether General Motors was damaged.

It is significant to note that in the Government case, at the hearing on divestiture, it was deemed necessary to protect the respective interests of the stockholders of General Motors and du Pont by the designation of independent outstanding *amici curiae* who made their respective reports to the Court (177 F. Supp. 1 at pp. 6, 8, 9,; 366 U.S. 316 at pp. 319, 320).

But in the instant case General Motors did not see fit to have this done. On the contrary it struggled to prevent and impede any independent investigation to protect its own stockholders although such investigation had met with the approval of this Court when it denied leave to appeal (268 F.2d 194).

In recent "pay-off" revelations, important domestic corporations deemed it necessary, voluntarily, to have an outside independent investigation so that the administration could report to its stockholders, but General Motors did not do this.

Du Pont's hard adversary position is understandable. It was only normal for it to resist and resist vigorously having to account for its actions. It was the target and might have been compelled to pay enormous sums. But the position General Motors consistently took was obdurate and incomprehensible.

Not only did General Motors actively oppose plaintiffs' suit but it attempted upon this application for counsel fees to claim that there was no necessity for *Gottesman* by distorting the findings of the Supreme Court.

In opposition to our application General Motors claimed that Judge Le Buy's original findings that there had been no violation of the Sherman Act charges and no restraints were still

in effect, stating (A102a): "The Supreme Court opinion expressly left this finding undisturbed."

But General Motors knew that this claim which it had originally made in its answer was not valid (*supra*, pp. 10-12). In now repeating this claim, General Motors deliberately overlooks what the Supreme Court said in this connection:

> "Since a holding that the Clayton Act had been violated sufficed to dispose of the case, we did not decide whether du Pont had also violated the Sherman Act. See 353 U.S. at 588, note 5" (366 U.S. 316 at 319, note 1).

More importantly, General Motors' claim is even contradicted by the final judgment of March 1, 1962, of Judge Le Buy in which he modified his original judgment in view of the Supreme Court decisions and *vacated* completely his prior dismissal of the Sherman Act charges. General Motors was aware of this for it had participated in proceedings which led to the modification.

General Motors' further statement (A102a) that the Supreme Court did not quarrel with the District Court's original finding of non-restraint is also without any merit. It completely overlooks what the Supreme Court at various times in its opinions specifically stated (*supra*); it overlooks what this Court ruled in 414 F.2d 956 when it reversed 221 F. Supp. 488, and remanded the case; it overlooks what Judge Metzner, in compliance with this Court's decision, found had also been *prima facie* established, *i.e.*, (1) that du Pont had 23% stock interest which gave it practical or working control over General Motors (279 F. Supp. at 368, and see 353 U.S. at p. 607, note 36, and p. 610) and (2) that du Pont used its control over General Motors "to entrench itself as the primary supplier of automotive fabrics and finishes to General Motors" and that this "led to the insulation from free competition of most of General Motors market in automotive fabrics and finishes" (310 F. Supp. at pp. 1259, 1260).

General Motors in its opposing papers (A101a) also quotes from the original decision of Judge Le Buy in order to try to show that du Pont did not exercise control over General Motors. But these findings were not consistent with the Supreme Court's actual findings when it reversed.

A. *Gottesman* **Benefited General Motors Stockholders.**

In exercising its equity jurisdiction, the courts have granted counsel fees in derivative suits where it has found that the suit had been instituted in good faith and based on reasonable grounds and that a common benefit has been conferred by the suit upon all corporate stockholders. In such event, the courts hold that the plaintiffs-stockholders should not be saddled with the expense of the suit which should fairly be borne by the corporation. These benefits need not be monetary but could consist of a variety of matters.

The facts stated in plaintiffs' papers in support of the instant application have not been disputed in any important respect. It is also not disputed that *Gottesman* was instituted and continued in good faith and that the plaintiffs had reasonable grounds for such suit in view of the decisions and findings of the Supreme Court.

It is submitted that the institution and continuance of *Gottesman* was in the best interests of General Motors stockholders and a review of the various proceedings discloses that various substantial benefits were conferred upon them even though no judgment was finally obtained against du Pont.

(1) It was inconceivable after the Supreme Court reversal that General Motors should be permitted to stand idly by and permit limitations to run against any claim it might have against du Pont. At the outset, *Gottesman* over the objection of both defendants, established plaintiffs' right and claim to institute suit on behalf of General Motors and to obtain an accounting by du Pont as to its illegal actions in its sale of automotive fabrics and finishes. This claim is independent of the principal cause of action by General Motors against du Pont.

The "dual nature" of a stockholders' suit was recognized in *Ross v. Bernhard,* 396 U.S. 531 at 534, 535 (1970). The establishment of this preliminary claim and right to sue du Pont on behalf of General Motors was of clear benefit to General Motors stockholders. Instead of permitting the administration of General Motors to do nothing vis-a-vis du Pont after the Supreme Court decision, *Gottesman* enabled the stockholders at the outset to reach first base in their attempt to obtain a hearing and an accounting by du Pont and avoid the further running of limitations against any claim General Motors might have. This

benefit, it is submitted, would have been properly the basis of an interim allowance.

(2) Then, *Gottesman,* over the objection of defendants, sought to have the damages which General Motors might recover be in as large amount as possible. We have set forth the various services in this connection which benefited the stockholders for it would have enabled them to increase the size of recovery upon any accounting (*supra*).

(3) Further, *Gottesman,* by securing a reversal in this Court (414 F.2d 956) of 221 F. Supp. 488, significantly established that although du Pont's violation was held to be only of Clayton §7, it did give rise to a damage claim against it; and further that General Motors, although not a competitor, could assert such damages (see *NBO Industries etc. v. Brunswick Corp., supra,* pp. 19-20). *Gottesman* also established that the findings of the Supreme Court could be effectively used to establish such damages. In accomplishing this, *Gottesman* not only benefited General Motors but served to benefit all stockholders by vindicating the statutory policy for the enforcement of the antitrust laws (see *infra,* Point IB). For such services, it is submitted plaintiffs were entitled to apply for an interim allowance (*Mills, infra,* p. 30).

(4) Finally and most significantly, by securing over the objections of both defendants, what, in reality, was a compulsory accounting by du Pont at a trial as to its sales of automotive fabrics and finishes to General Motors and whether damages were sustained by General Motors, *Gottesman* conferred a real and substantial benefit upon its stockholders.

It resolved the question necessarily arising from the unlawful antitrust actions of du Pont and its breach of fiduciary relation owed to General Motors as controlling stockholder, whether damages had been sustained by General Motors. In obtaining such an accounting and determination, the best interests of General Motors stockholders were served and it involved salutary corporate therapeutics. This is true even though the results of the accounting produced no recovery against du Pont.

The authorities justify the granting of our application.

In *Saks v. Gamble,* 154 A.2d 767 (Del. Ch. 1958) a derivative suit was instituted on behalf of Gamble-Skogmo claiming alleged diversions of corporate opportunities. The suit

was instituted because of plaintiff's inability to obtain the facts from defendant prior to litigation. After extensive pre-trial and discovery, it was ascertained that there had been no improper diversions and the suit was dismissed.

An application was made by plaintiff for their attorneys' and accountants' fees. The defendant Gamble-Skogmo objected to paying any such fees, claiming that plaintiffs were not entitled to them, since (768):

> ". . . plaintiff's actions conferred no real benefit upon Skogmo (Gamble-Skogmo). . . ."

The Court (Seitz, J. now Chief Judge United States Court of Appeals, 3rd Circuit) found that the action was caused because of the actions and practices of defendant Gamble-Skogmo and he concluded (769):

> ". . . that at the time plaintiff commenced the action she was not unreasonable in assuming that Skogmo did not own Associates' common stock."

Then in ruling that plaintiff was entitled to payment of attorneys' fees and expenses, the Court said (770):

> "My overall conclusion is that Skogmo, assuming that it always owned Associates' common stock, engaged in conduct which justified the filing of this action and justified its continued prosecution until the interrogatories were answered by Skogmo disclosing that it owned Associates' common stock. I find it unnecessary to decide whether in fact there was doubt about this ownership. *However, it does stand undisputed that for the first time the matter has been removed from the area of possible substantial doubt. This is a benefit to the corporation.*
>
> I therefore conclude that plaintiff is entitled to reimbursement for her attorneys and accountants for the benefit conferred." (italics added).

The Court continued (p. 170):

> "I conclude that the benefit which was conferred upon Skogmo by this action cannot be directly measured in dollars and cents. However, I am satisfied that it was of sufficient value to justify the allowance of reasonable fees."

In Vol. 13, Stanford Law Review 146, *Shareholder Suits, Pecuniary Benefit Unnecessary for Counsel Fee Award,* the author, after referring to *Saks v. Gamble* and other authorities, stated (p. 148):

> "This and other recent cases show that the main, though often unarticulated policy of counsel fee awards is not solely to reimburse the successful plaintiff for his efforts on behalf of the corporation, but, regardless of corporate benefit to encourage private individuals to police corporate activities."

Saks v. Gamble and the article in 13 Stanford Law Review 146 were cited by the Supreme Court in its decision in *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375 (1970).

The *Mills* case was a derivative suit in which plaintiffs claimed that there had been a securities act violation. Reviewing the case on interlocutory appeal, the Supreme Court held that since a securities violation was shown, plaintiffs were entitled to interim counsel fees and expenses, irrespective of whether any relief at all would ultimately be granted; and that even though no specific statutory provision provided for such payment, the court had equitable power to order it.

In overruling defendant's objection to payment of such fees, the Court stated (p. 395):

> "However, an increasingly number of lower courts have acknowledged that a corporation may receive a 'substantial benefit' from a derivative suit, justifying an award of counsel fees, *regardless of whether the benefit is pecuniary in nature.*" (italics added).

In support of this statement, *Mills* in footnote 22 at page 395 cited various authorities including *Saks v. Gamble* and the article in 13 Stanford Law Review 146.

The Court also noted (p. 394):

> "This development has been most pronounced in shareholders' derivative actions, where the courts increasingly have recognized that the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in the corporation's favor." (In support of this holding the Court in its footnote 18 referred to the authorities listed under footnote 22 and others.)

The Court rested its decision upon the ground that (p. 396):

> "Whether petitioners are successful in showing a need for significant relief may be a factor in determining whether a further award should later be made. *But regardless of the relief granted, private stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute.*" (italics added).

The *Mills* case was the subject of an article in 38 University of Chicago Law Review 316 (1971) entitled *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.* This article was cited by the Supreme Court in its later decision *Hall v. Cole, supra* at p. 5, footnote 4. The article, referring to the *Mills* decision, said (327):

> "The Court was concerned not with the benefit of this suit to these shareholders, but with the benefit of this type of suit to the public interest. '[P]rivate stockholders' actions of this sort "involve corporate therapeutics," and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute.' Reimbursement for attorney's fees is a means of enforcing the law."

Further the article continued (p. 332):

> ". . . the 'benefit' language is open to various technical interpretations. *Mills* ties the benefit to 'corporate therapeutics' and 'the stress placed by Congress on the importance of fair and informed corporate suffrage.' The Supreme Court looked neither to the actual effect on the specific corporation nor to the motives of the plaintiffs."

In *Fishman v. Wexler,* 309 F. Supp. 976 (U.S.D.C. Del. 1970) in approving payment of counsel fees, the Court stated (p. 979):

> "A reasonable attorney's fee under the circumstances should be based on the beneficial 'corporate therapeutics' performed in this case and the need to avoid discouraging counsel from undertaking the risk of derivative suits such as this one which happens to have run aground."

In *Voege v. North American Rockwell Corp. et al.,* (S.D.N.Y. — 73 Civ. 685) Judge Owen on May 20, 1976 granted an application for payment of counsel fees in a class action. He stated that the corporate benefit, at best, was limited to corporate therapeutics and added (p. 3):

> "On the other hand, I have no reason to assume that counsel has not acted in good faith in the commencement or resolution of this action or spent less hours on this matter as claimed. I conclude, therefore, that the services rendered, terminating as they have, should be compensated . . . ."

Becker et al. v. Martin et al., (U.S.D.C., S.D.N.Y. — Civ. 124-123) was a consolidated derivative suit based upon actions by defendant Bates Manufacturing Co. with respect to Windsor Industries, Inc. The action was discontinued with prejudice, General Counsel for plaintiffs advising the Court that in his opinion there was little likelihood of success.

In his supporting memorandum, after referring to three Delaware authorities,[6] he stated (pp. 3,4):

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6. *Allen v. Durning, Floyd Odlum et al.,* Civ. Action #630 (Del. Ch. 1954); *Chemerinsky v. Airfleets, Atlas Corp. et al.,* Civ. Action #1573 (U.S.D.C. Del. 1957); *Brophy v. City Service,* (Del. Ch.).

> ". . . The Court in those cases approved the payment of legal fees by the corporation on whose behalf the action was commenced, primarily on the theory that the actions were commenced in good faith; that the plaintiffs' counsel and accountants served a useful corporate purpose in securing a thorough investigation of the transactions; . . ."

The application for payment of counsel fees in the *Becker* case was granted by order of the District Court (Metzner, J.) dated January 13, 1960.

In granting costs to unsuccessful minority stockholders up to the time the propriety of the corporate action was determined, the Court in *Kennedy v. Emerald Coal & Coke Co.*, 30 A.2d 269 (Del. Ch. 1943) stated that the facts (270):

> ". . . might be expected normally to impel a reasonable man, situated as was the original complainant, to bring suit. From these circumstances, coupled with the complainant's entire good faith, it follows that the complainant was 'justified' in the sense that this term is used in *Wittenberg v. Federal Mining & Smelting Co.*, 15 Del. Ch. 351, 355, 138 A. 352, in filing his bill of complaint."

In exercising the discretionary power given to the Surrogate, the New York courts have granted counsel fees to parties although their positions were not sustained, because of the benefit to the estate conferred by their action. In *Schenectady Trust Co. v. Emmons*, 263 App. Div. 542, the Court stated the following with respect to the granting of an allowance to an unsuccessful attorney in an estate proceeding (543):

> ". . . These questions were intricate and required considerable research and study. *Also as long as appellant's claim to an interest in the trust was not determined there could be no certainty as to the rights of the other parties therein, so that, while appellant was not a necessary party to the action, he was in every sense a proper one and it was to the advantage of all concerned that he be a party and that there be a judicial determination*

> *of his rights. Only in this way could it safely be said with finality that his claim to a share of the trust estate was not well founded.* Nor was his claim baseless on its face. Under all these circumstances the Special Term had ample power in the exercise of its sound discretion to make an allowance to appellant. Provost v. Provost, 70 N.Y. 141; Herrington v. Robertson, 71 N.Y. 280; Barnes v. Midland Railroad Terminal Co., 218 N.Y. 91, 112 N.E. 926. It was not necessary that the appellant succeed in the action at the Special Term before that court could exercise this discretion. 'This does not mean the party who is technically successful; that is, who obtains a decree in his favor upon the question contested. It means the party whose behavior in the circumstances provoking the litigation, whose situation in relation to the estate, or the particular subject in controversy is such, as that it is equitable and just, that he be remunerated for his expenses in the litigation,' Noyes v. Children's Aid Society of New York, 70 N.Y. 481." (italics added).

To the same effect are *Matter of Osborne,* 18 A.D. 2d 973 (1st Dept. 1963) at p. 974; *Matter of Heller,* 10 M.2d 363 (Botein, J.) at p. 366.

B. *Gottesman* Also Served to Vindicate the Statutory Purpose of the Antitrust Laws.

A strong public policy dictated that an independent suit and judicial determination be obtained after the Supreme Court decision, to determine whether General Motors had been damaged as a result of du Pont's illegal activities.

This public policy was recognized by this Court (414 F. 2d 956) when in permitting a suit for damages in connection with du Pont's Clayton Act violation, it quoted (p. 961) the following from *Minnesota Mining,* 381 U.S. 311, 318:

> "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."

In *Atlantic City Electric Co. v. General Electric Co.*, 226 F. Supp. 59 (*appeal denied*, 337 F. 2d 844), Judge Feinberg stated (71):

> "Finally, the most significant consideration is the strong public policy in favor of private treble-damage actions, which are intended not only to compensate those injured by violation of antitrust laws, but also to function as an independent method of enforcing antitrust policy."

This strong policy favoring such supplemental suit was particularly applicable here because of the dominant positions du Pont and General Motors enjoyed in American industry, the hundreds of thousands of stockholders in these corporations scattered all over the world, the fact that du Pont for many years held "practical control" over General Motors and used such control in its dealings with General Motors, the long and close inter-company relationship that developed and continued between the companies, the potential liability of du Pont to General Motors for large sums, the need for public confidence in the proper administration of such large companies and their compliance with the laws and their accountability for breach thereof and, finally, the strong beneficial and therapeutic effect such an investigation and judicial determination would have upon the companies themselves, upon industry and the general public.

In *Mills, supra,* the Supreme Court held (p. 396) that irrespective of any relief being granted, stockholders' derivative suits "involve corporate therapeutics" and furnish a benefit to all stockholders by "providing an important means of the enforcement of the proxy statute". So, too, *Gottesman* resulted in the establishment of "important means of enforcement" of the antitrust laws in various significant aspects:

(1) By establishing at the outset that plaintiffs had the right on behalf of General Motors to sue du Pont for a compulsory accounting;

(2) By establishing, upon appeal, that the adjudicated violation by du Pont of Clayton §7 predicated upon the Supreme Court findings, was the basis of a claim for damages against du Pont with respect to automotive fabrics and finishes. This was established after the District Court in 222 F. Supp. at

493 had stated: "No case has been found where damages have been awarded for such a violation";

(3) By establishing that General Motors, which was not in the fabrics and finishes business could nevertheless recover damages from du Pont for its Clayton §7 violation (*supra*).

(4) Further, the fact plaintiffs-stockholders, over the continuous objections of two of the country's industrial giants, were able to compel du Pont to account for its unlawful actions, we respectfully submit, constitutes as *Mills* indicated, a clear case of salutary corporate therapeutics "regardless of the relief granted" and also furnished "a benefit to all stockholders".

Subsequent to the decision of the Supreme Court in *Alyeska, infra,* this Court, following the rulings in *Mills, supra,* recognized the benefit gained by action which vindicates a statutory policy.

In *Kopet v. Esquire Realty,* 523 F.2d 1005 (1975), the Court reversed an order of the District Court denying an application for counsel fees in a class action involving a limited partnership and stated (1008):

> "In *Mills,* which involved proxy violations under the 1934 Act, the Court found that 'the stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders.' 396 U.S. at 396, 90 S. Ct. at 622. Here, similarly, it appears that appellant rendered a service to the partnership by vindicating the statutory policy against unregistered offerings."

In its opinion denying plaintiffs' application, the Court stated (A126a):

> "Actually, the basis for the requested compensation in this case is similar to that urged in *Alyeska Pipe Line Co. v. Wilderness Society,* 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975). The decision in *Alyeska* completely forecloses any recovery here. The instant action

> was an antitrust case in which plaintiffs were cast in the role of the private attorney general."

However, it is respectfully submitted that this is not accurate. In *Alyeska* the Court denied recovery of counsel fees to successful plaintiffs who were solely acting in the role of private attorneys general and its denial was predicated upon the fact that there was no statutory authorization for such payment and no common benefit to stockholders.

Alyeska was not a stockholder derivative suit. Both the majority (pp. 257, 258) and minority (pp. 271, 272) opinions in *Alyeska* cited with approval *Mills* and other cases holding that the courts still have discretion to grant counsel fees where benefit resulted from a derivative stockholders' suit or it served to vindicate a statutory policy, or other valid equitable grounds existed.

In *Gottesman* plaintiffs were not simply acting as a private attorney general. They had a direct personal interest in the outcome. They were stockholders seeking in their action, instituted with court approval, to protect their own interest as stockholders as well as that of their fellow stockholders by reason of the failure, refusal or inability of the administration of their corporation, General Motors, to do so.

In its opposing papers (A97a, footnote) General Motors seeks to differentiate *Saks v. Gamble, supra,* but it is submitted its attempted differentiation does not hold water.

Just as the *Saks* case conferred benefit by revealing intercorporate activities and removing doubt as to stock ownership caused by the action of the defendant, so *Gottesman,* by securing a compulsory accounting over objection of the defendants, concerning the illegal activities of du Pont, conferred a benefit upon General Motors stockholders.

In its opposing papers (A95a, footnote) General Motors cites a decision of Judge Weinfeld in *Lewis v. Arcara* as if the Court had denied an application for counsel fees. However, a reading of the opinion discloses that the Court made the following holding:

> "Indeed this litigation might have been avoided and the corporation put to no expense had the attorneys for the corporation advised

> plaintiff's attorney of the full terms of their arrangement with the officer. . . . Considering all significant factors, the Court finds, and fixes . . . a fair and reasonable fee . . . which is allowed plaintiff's attorney. . . ."

C. The Obdurate Conduct of General Motors Also Justifies the Granting of the Application Against It.

In citing *Korn v. Franchard Corp.* in its opposing papers (A98a-99a) General Motors quotes an extract from Judge Conner's decision but in doing so, omits a significant phrase which is especially applicable in *Gottesman* because of the obdurate actions taken by General Motors throughout the litigation. The complete sentence of the opinion reads:

> "My decision is based solely upon the inappropriateness of awarding attorney's fees *in the absence of obdurate behavior on the part of the applicant's adversary* or a benefit to the class represented by the applicant" (part omitted by General Motors is in italics).

Where an adversary is guilty of vexatious, oppressive or obdurate conduct the Court has full discretion to grant counsel fees even to an unsuccessful plaintiff. This was recognized by du Pont in its opposing papers (A80a, footnote) where it claimed that no allowance should be granted against it upon that ground because it had not been guilty of such behavior.

In connection with the "intransigence" of a party the Court in *International Union v. Peerless Pressed Metal Corp.*, 489 F.2d 768 (C.A. 1-1973) stated (769):

> "The award of such fees will be confined to services in connection with proceedings in the district court. *We do not say, as a matter of law, that a party's ability to persuade a district court to rule in his favor necessarily insulates him against a fee award.*" (italics added).

In the litigation and trial of automotive fabrics and finishes, General Motors should have cooperated with plaintiffs, or at least remained neutral, for after all, it was the party who would have benefited by any recovery. *Gottesman* was instituted with the approval of the Court and the action was continued in good

faith only because of the inability and failure of General Motors, both before and after divestiture, to institute suit against du Pont or to have a determination of its claims made before some impartial and disinterested tribunal.

As we have noted, *supra,* in connection with automotive fabrics and finishes, no claim in *Gottesman* was made of any wrongdoing on the part of General Motors and it was not adjudicated in the Government case to have violated Clayton §7 along with du Pont.

Under these circumstances, General Motors should not have taken a position antagonistic to the claim asserted against du Pont with respect to automotive fabrics and finishes. As stated in *Chaplin v. Selznick,* 186 Misc. 66 (1945) by Mr. Justice Shientag (68, 69):

> "The corporation itself can take no position in a derivative stockholder's suit which is fundamentally antagonistic to the claim asserted on its behalf. That is the whole theory which is behind a derivative stockholder's action."

Instead as noted from the very beginning General Motors has taken an obdurate, vexatious and antagonistic position. It has demonstrated that it was more interested in du Pont avoiding any obligation to pay General Motors what might have been an "astronomical" sum than in trying to obtain recovery for itself.

What the final result would have been in this extremely complex case is not certain if General Motors had cooperated so that there would have been a full disclosure and exposure of all the facts, instead of having placed roadblocks continually in the path of plaintiffs. But we submit that its obdurate, unreasonable and hard adversary position was not in the best interests of General Motors stockholders and prolonged the final determination of the accounting by du Pont.

Plaintiffs, of course, are disappointed that the results in *Gottesman* produced no affirmative monetary recovery against du Pont so that a traditional basis might apply to their present application. However, under all of the facts and circumstances, it is respectfully submitted, under the authorities, that plaintiffs are fairly and equitably entitled to payment from General

Motors of reasonable counsel fees and payment of their $345,059.94 disbursements.

II.

DU PONT SHOULD BE REQUIRED TO PAY THE EXPENSES FOR THE *GOTTESMAN* SUIT FOR THE ACCOUNTING WAS REQUIRED AS A RESULT OF ITS ADJUDICATED VIOLATION OF CLAYTON SECTION 7.

We have shown, *supra*, that it was established that du Pont not only had practical or working control over General Motors through its stock ownership but that it exercised and used such control for its own purposes in its sales to General Motors.

Under the Supreme Court findings this Court held that in *Gottesman* it was *prima facie* established that du Pont used its controlling stock interest "to entrench itself as the primary supplier of automotive fabrics and finishes to General Motors" and that its use of its controlling stock interest "led to the insulation from free competition of most of General Motors market in automobile fabrics and finishes". (414 F.2d 956, 959-962; 310 F. Supp. at 1259, 1260).

It is, accordingly, submitted that du Pont as controlling stockholder occupied a fiduciary relationship in connection with its sales to General Motors; and that in connection with such sales, du Pont, when called upon to account, has the clear burden of coming forward with evidence as well as the overall burden of proof to establish the scrupulous fairness of its sales to General Motors.

In determinating whether du Pont sustained its burden of proof, the courts employ an objective test. In *Pepper v. Litton*, 308 U.S. 295 (1935) the Court stated (306):

> "Their dealings [by a controlling stockholder] with a corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder *not only to prove the good faith of the transaction but also to show its inherent fairness* from the viewpoint of the corporation

> and those interested therein. *Geddes v. Anaconda Copper Min. Co.*, 254 U.S. 590, 599, 65 Leg. 425, 432, 41 S. Ct. 209. The essence of the test is whether or not under all the circumstances the transaction *carries the earmarks of an arm's length bargain.* If it does not, equity will set it aside." (italics added).

In *Southern Pacific v. Bogert*, 250 U.S. 483 (1919) in holding that a controlling stockholder has a duty to account, Mr. Justice Brandeis speaking for the Court stated (492):

> "Equally unfounded is the contention that the Southern Pacific cannot be held liable because it was not guilty of fraud or mismanagement. The essential of the liability to account sought to be enforced in this suit lies *not in fraud or mismanagement* . . ." (italics added).

In the opposing papers in attempting to justify its action in avoiding an accounting, du Pont quotes (A86a) some extracts from the Supreme Court decision but does not include significant portions. So after the first quotation which begins with "that considerations" and ends with "supply the best," the Court said the following (606):

> "But the wisdom of this business judgment cannot obscure the fact plainly revealed by the record that du Pont purposely employed its stock to pry open the General Motors market to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics."

Then after the second quotation which begins with ". . . all concerned" and ends with "overreach anyone" the Court added (607). ". . . including du Pont's competitors does not defeat the Government's right to relief."

In considering therefore the accountability of du Pont, as fiduciary, the fact that the parties may have acted "in good faith" or that there may be no "fraud or mismanagement" is not determinative.

In *Gottesman* the complaint not only charged du Pont with

antitrust violation with respect to its sales of automobile fabrics and finishes but also squarely charged it with breach of its common law fiduciary obligation to General Motors (ninth cause of action). This cause was initially tried along with the antitrust violation.

At the first trial Judge Metzner discussed plaintiffs' fiduciary claims, stating (279 F. Supp. at 384, 385):

> "Nevertheless, there is some evidence which would permit an inference that even after 1923 du Pont did exert some degree of influence and control over the general business affairs of General Motors through the membership of its designees on the Executive Committee and Policy Committee. See pp. 365, 367 *supra*. Whether on this record that influence was enough[7] to impose the fiduciary duty need not be decided, since it is my conclusion that even if there was a fiduciary duty, it was not breached in relation to the purchases of finishes and fabrics.
>
> When a fiduciary is challenged for having engaged in self-dealing in property or services of the corporation, the fiduciary obligation results in both the burden of coming forward with evidence and the burden of persuasion being shifted to the fiduciary to demonstrate that the transactions were scrupulously fair. The test is an objective one; liability of the controlling corporation hinges on the fairness of the challenged transactions.
>
> * * *
>
> I find that, even if du Pont was a fiduciary, it has carried its burden and it has not violated any fiduciary duty."

Upon appeal, this Court noted (414 F.2d at 958) that Judge Metzner had found "that du Pont had not abused any fiduciary

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7. It is respectfully submitted that the findings of the Supreme Court and other evidence clearly established the fiduciary duty.

duty to General Motors" but in remanding, stated it was not necessary to pass upon that holding (965).

Upon the second trial, Judge Metzner adhered to his original decision dismissing plaintiffs' claim of breach of fiduciary obligation. In sustaining the dismissal upon this point, this Court stated (436 F.2d at 1211, 1212):

> "The plaintiffs' final argument is that the trial judge erred in rejecting their contention that du Pont's antitrust violation breached a fiduciary obligation it had to General Motors. . . The trial judge found that du Pont has sustained the burden of demonstrating that its transactions with General Motors were scrupulously fair. The plaintiffs have not satisfied us that these findings of the trial judge are erroneous."

In *Gottesman* where the sales by du Pont as controlling party to General Motors as the party controlled have been adjudged to have violated the antitrust law, there exists, it is submitted — irrespective of the outcome of the accounting and even if du Pont sustained its burden of proof — every reason to impose the costs and expenses of such accounting upon du Pont for its illegal action and adjudicated violation were the direct causes for the necessity of *Gottesman* and for an accounting.

Such a reason particularly exists here where du Pont did not satisfy its burden upon some voluntary accounting but only did so when after many years of vigorous litigation it was finally compelled to do so.

Text writers approve our position. 3 Scott on Trusts (*The Law of Trusts* 3rd Ed.) states (§1884, p. 1535). "So also if the trustee was at fault in causing the litigation, he must personally bear the expenses of the litigation." and (§245, p. 2155). "So also in any case where the litigation results from the misconduct of the trustee, the expense of the litigation must be borne by him."

Bogert Trusts and Trustees (*The Law of Trusts and Trustees* 2nd Ed.) states (p. 179): "A court which exercises this discretion will naturally consider whether the expense was caused by the fault of the trustee or other party, and also what was the object and effect of the litigation."

90 C.J.S. §420, pp. 818, 819 states: "Similarly a trustee may be charged with the costs and expenses of his accounting where he has rendered necessary the incurring of such costs and expenses by his misconduct or negligence, or where on a contested settlement the finding is against him."

III.

BOTH du PONT AND GENERAL MOTORS SHOULD BE REQUIRED TO BEAR THE EXPENSE FOR PLAINTIFFS' FINAL REPORT TO THE COURT.

The moving papers disclose that after the final dismissal of the causes of action in *Gottesman* pertaining to automotive fabrics and finishes, at the request of counsel for du Pont and General Motors, General Counsel for Gottesman as well as counsel for Schiff agreed, to review all of the books and records available to them pertaining to the remaining causes of action in *Gottesman* and the causes of action in *Schiff* and to make a report to the Court as to whether it would be in the best interests of the stockholders of General Motors to continue with further litigation in *Gottesman* and *Schiff* — which could conceivably require some years (A20-21).

Plaintiffs agreed to do so provided that du Pont and General Motors supplied whatever additional data was required for the reports. Accordingly, du Pont and General Motors supplied additional schedules, proof, etc., to plaintiffs and to counsel for Schiff.

After reviewing all of the records including the additional matter supplied, General Counsel for Gottesman and Counsel for Schiff filed their reports with the Court in which they recommended that it would be in the best interests of the stockholders of General Motors that this litigation which thus far had continued for about twenty years, be terminated by a final dismissal. Then after notice to stockholders, followed the final dismissal of *Gottesman* and *Schiff*, the Court permitting plaintiffs to apply for their counsel fees and expenses.

It is respectfully submitted that wholly apart from the benefit derived from the services discussed under Point I, the additional services benefited both General Motors and du Pont and plaintiffs should equitably be entitled to receive payment for them.

IV.

THE ORDER APPEALED FROM SHOULD BE REVERSED AND THE MATTER REMITTED TO THE DISTRICT COURT FOR A DETERMINATION OF THE REASONABLE VALUE OF THE SERVICES RENDERED BY PLAINTIFFS' ATTORNEYS AND THEIR EXPENSES.

Under all of the facts and circumstances of this unique and challenging case, a grant of plaintiffs' reasonable counsel fees and substantial disbursements for services conscientiously performed over a period of some twenty years, it is submitted, would not be in conflict with any established policy of this Court in view of the various benefits conferred upon General Motors, its own stockholders and stockholders in general, the vindication of the statutory policy, the establishment of means for the enforcement of Clayton §7 of the antitrust laws, the obtaining of a compulsory accounting by du Pont with respect to its sales over many years of automotive fabrics and finishes to General Motors and the resulting beneficial corporate therapeutic action.

General Counsel does not approve the individual application for fees filed, separately on his own behalf by Clendon H. Lee, Esq. who assisted Mr. David Brady in rendering services in *Gottesman*. Mr. Lee's application was not filed by or on behalf of plaintiffs in accordance with Judge Metzner's judgment (*supra*, p. 1) which permits "plaintiffs" to apply for counsel fees; it was not filed with the approval of General Counsel or in accordance with counsel's agreement. However to the extent that Mr. Lee's application and brief support the granting of plaintiffs' application, we of course do not object to its consideration by the Court.

CONCLUSION

It is accordingly requested that the order dated April 12, 1977 appealed from be reversed and the matter remanded to the District Court for a determination of plaintiffs' reasonable counsel fees and disbursements.

Respectfully submitted,

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Dated October 14, 1977

COURT OF APPEALS
SECOND CIRCUIT

CALLMAN GOTTESMAN & PAUL J. PEYSER,

Plaintiffs-Appellants,

- against -

GENERAL MOTORS CORPORATION &
E.I. DU PONT DE NEMOURS & COMPANY,

Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF) *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 112 West 136th Street; New York, New York

That on the **17th** *day of* **October,** *19* **77** *at* **767 Fifth Avenue New York, N.Y.**

deponent served the annexed **Appendix Brief** *upon* **John Higgins, Esq (Higgins: accepting service of 6 each for General Motors & DuPont-appellees)**

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this **17th** *day of* **October,** *19* **77**

James A. Steele

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979